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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 212

NEW YORK CENTRAL RAILROAD COMPANY
Petitioner

against

DONATO MARCONE, as Administrator of the Estate of Joseph Marcone, deceased
Respondent

Petition for Writ of Certiorari to the Court of Errors and Appeals of the State of New Jersey, and Brief in Support of Petition

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No.

NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,

v.

DONATO MARCONE, as Administrator of the Estate of Joseph Marcone, deceased,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The New York Central Railroad Company, the petitioner herein, respectfully represents:

1. This action was brought in the Circuit Court of Hudson County, New Jersey, under the Federal Employers' Liability Act, by the respondent (plaintiff below) against petitioner (defendant below) to recover damages

for the death of Joseph Marcone, deceased, respondent's intestate.

2. Decedent was run over by petitioner's engine No. 3709 on track 8 at its roundhouse at New Durham. At the time of his death he was employed by petitioner to pack journal boxes and otherwise lubricate petitioner's engines, some of which were used in interstate and some in intrastate commerce.

3. The complaint alleges that decedent was employed by petitioner in interstate commerce at its New Durham roundhouse, where it negligently propelled against him a locomotive which ran over and killed him; that petitioner's negligence consisted in the failure to use reasonable care to keep said locomotive under control, to give warning of the movement thereof, to keep the same in proper and suitable condition as to brakes, appliances, etc., so it could be stopped by the use of reasonable care in time to avoid injuring decedent; that petitioner failed to equip the locomotive with suitable headlight or any light, and did not use reasonable care to propel the same at a safe rate of speed (Record, p. 1, line 30, to p. 2, line 25).

4. The answer denies that at the time of the accident decedent was engaged in interstate commerce; denies any negligence on its part and alleges as affirmative defences that the injuries sustained by decedent arose out of his negligence in going and standing upon a railroad track operated by petitioner at a time when it was unnecessary, improper and obviously dangerous for him so to do; that at the time and place of the accident decedent was a mere licensee and at the time of the accident he was not engaged in interstate commerce (Record, p. 3, line 25, to p. 4, line 20).

5. On May 7th, 1928, respondent recovered judgment against petitioner for the sum of $7,000 with costs (Record, p. 126, line 20).

6. Petitioner appealed from said judgment to the New Jersey Court of Errors and Appeals in the Last Resort in all Causes, and that Court on February 4, 1929, affirmed said judgment by a divided court, eight members thereof voting to affirm and three to reverse (Record, pp. 138, 159).

7. On February 14, petitioner moved before said Court of Errors and Appeals for leave to file a petition for a rehearing of said cause. The motion was granted, and it was ordered that the remittitur be held in that Court pending the determination of the petition for rehearing.

8. Pursuant to the leave granted on February 14, 1929, a petition for reargument was presented to said Court of Errors and Appeals on February 25, 1929 (Record, p. 139).

9. Notwithstanding the order that the remittitur be retained in the Court of Errors and Appeals to await the determination of the petition for rehearing, it was inadvertently sent down to the Hudson County Circuit Court, and on March 21, 1929, an order was made by said Court of Errors and Appeals that the record be returned to said Court, and be there retained by that Court until its further order, pursuant to its direction of February 14, 1929 (Record, p. 155).

10. On April 19, 1929, the petition for rehearing was denied and the petition dismissed (Record, p. 156).

11. On April 25, 1929, an order was entered in said Court of Errors and Appeals directing that the record be retained in that Court to await the application by peti-

tioner for a writ of certiorari to the Supreme Court of the United States, and on the same date an order was entered staying execution on said judgment (Record, p. 157).

12. Permission having been granted by the Court of Errors and Appeals to file a petition for a rehearing, the time for applying for a writ of certiorari from this Court began to run on April 19th, 1929, the date when the petition for rehearing was denied.

Respondent gave notice of a motion to dismiss the order staying execution, but abandoned said motion (Record, p. 163). No order was made thereon.

The Matters Involved.

13. The questions presented on this application are:

(a) At the time of the accident was respondent's decedent engaged in interstate commerce?

(b) Was the evidence in the cause sufficient to charge petitioner with negligence?

(c) Was decedent's death due (1) to his own negligence; (2) to his disobedience of petitioner's orders?

Summary of Facts.

14. Petitioner is a common carrier engaged in interstate and intrastate commerce. It operates a roundhouse at New Durham, New Jersey, in which are thirty-two engine stalls. Adjacent thereto and distant 68.3 feet from the rear doors thereof is a turntable. From these stalls engines are backed onto this turntable. The number of engines in the engine house varies materially. Sometimes the stalls are full, and other times but few stalls are occupied (Record, p. 68, line 12; Exhibit D-1, p. 159).

15. On the tracks in the roundhouse engines are inspected and put in condition for road service in either interstate or intrastate commerce (Record, p. 67, line 30).

16. Decedent was a member of a night inspection gang whose leader was Siddell. He was a box packer and lubricator. His duties were to pack journal boxes of the drive wheels of engines, and when requested, to fill the grease cups on these engines (Rcored, p. 40, line 40; p. 68, line 17; p. 70, line 30). He had been a member of this gang, doing this work under this leader for about one year, and had come to Siddell from a similar day gang (Record, p. 70, line 25). His place of work was in the roundhouse, and from long experience he was thoroughly familiar with the work and with the conditions in the roundhouse under which the work was carried on (Record, p. 68, line 25; p. 71, line 11; p. 100, line 22). This gang had an "inspection wagon" on which their tools, including the tools of decedent, were moved from engine to engine as their work progressed. This wagon was always moved along the concrete runway about ten feet wide which extended in front of all the engine stalls along the entire outer circumference of the roundhouse (Record, p. 72, line 40, to p. 73, line 22; p. 101, line 38, to p. 102, line 8).

17. On the night of the accident he began work at 7 P. M. and was to have quit at 3 A. M. (Record, p. 40, line 35; p. 101, line 10). On this night, prior to the accident, decedent had worked on fourteen engines. The last engine he lubricated was No. 3835 located on track 7. At about 2:15 A. M., the other members of the gang had finished their work on this engine, and the leader Siddell took all the men except decedent to do some work on an engine located a short distance outside the roundhouse. Before leaving, Siddell told decedent to finish his work

on engine 3835 and wait for him (Siddell) at the inspection wagon which was then located on the concrete runway in front of the engine stalls at a point in line with the open space between track 7 on which engine 3835 was located, and track 8 on which engine 3709 was located (Record, p. 68, line 30 to p. 69, line 22; p. 72, line 10 to line 38; p. 73, line 8; p. 101, line 15 to p. 102, line 5; p. 105, line 38 to p. 106, line 12).

18. Decedent was last seen alive at about 2:15 A. M., when Siddell left him at work on engine 3835 on track 7 (Record, p. 70, line 5). At about 2:35 decedent's dead body was discovered underneath the trucks of the tender of engine 3709 on track 8. That engine was then being backed on track 8 from the roundhouse to the turntable. The body when discovered was between the two rear trucks of the tender or in front of the second trucks from the rear, on the right-hand rail of track 8 adjacent to track 9 (Record, p. 17, line 38, p. 34, line 1; p. 64, line 35; p. 65, line 25; p. 82, line 10; p. 84, line 1; p. 35, line 20; Exhibit D-1, p. 134, showing X marks indicating the position of body on diagram of engine and on right side of track 8). The body was on or near the turntable (Record, p. 10, line 10; p. 35, line 20). Decedent's cap was found between the rails of track 8 about fifteen feet outside the door of the roundhouse. Blood stains were found on the right-hand side and rail of track 8, adjacent to track 9, beginning about thirty feet from the roundhouse and extending to the point where the body was found near or on the turntable. Marks as of something dragging were found along that rail beginning at a point where the blood stains were found (Record, p. 11, line 30; p. 36, line 12; p. 100, line 10; p. 85, line 20; p. 84, line 1). It is thus apparent that decedent was struck about midway between the door of the roundhouse and the turntable, and that he was run over on the right-hand rail

of track 8, *i. e.*, the far rail from track 7 and the rail adjacent to track 9.

19. Decedent had lubricated and completed his work on engine 3709 on track 8 before eleven o'clock, nearly four hours before the accident. He had no reason thereafter to go near that engine or upon track 8 where he was run over (Record, p. 71, line 20).

20. Siddell returned to the inspection wagon on the concrete runway about 2:35 or 2:40 A. M. Decedent was not there. He began writing his report of the night's work at the inspection wagon when he was informed that an accident had happened at the turntable. He then examined engine 3835 and found that all of decedent's work on that engine had been completed (Record, p. 69, line 5 to p. 70, line 25; p. 74, line 1; p. 97, line 30 to p. 98, line 15; p. 105, line 30). Siddell found all decedent's tools in place on the inspection wagon ready for removal from the roundhouse at quitting time (Record, p. 72, line 40; p. 98, line 15). None of his tools were found at or near the place where the accident happened (Record, p. 11, line 28; p. 83, line 10; p. 98, line 30). Siddell had no work for decedent after he had completed the work on 3835 (Record, p. 74, line 10; p. 106, line 32 to line 40).

21. There was no eye-witness to the accident. When, how or why decedent went to the place of the accident on the right-hand side of track 8, adjacent to track 9, is a matter of conjecture; that he had no work to do there is apparent. He was not attempting any work, for he had no tools with which to work.

22. Hostlers back the engines out of the roundhouse on to the turntable, and after they are turned they take

them to the water plug, about 300 feet from the turntable, where the engine crews take charge of them (Record, p. 26, line 18).

23. McGee, the hostler, who removed engine 3709 from the roundhouse on the night of the accident, testifies that he entered stall 8 at the rear of the engine, walked along its left side to the front, adjusted the cylinder cocks, and then passed in front of the engine, and along its right-hand side to the rear. He removed the two chains which blocked the drive wheels, and as he did this he looked underneath the engine to see if there were any obstructions or anyone working there. After reaching the rear of the engine on the right-hand side, he returned on that side to the cab, and mounted the engine. This was about 2:20 A. M. He then started the air pump to get up the air pressure, turned on the engine lights—headlight, rear light and cab lights (about twelve in all)—started the engine bell ringing by compressed air, and it continued ringing until after the accident (Record, p. 27, line 25; p. 29, line 18; p. 37, line 18; p. 51, line 5, to p. 55, line 20; p. 64, line 12; p. 67, line 8). When the air pump had been in operation from five to seven minutes, he sounded three blasts of the whistle as a warning that he was about to back the engine out and as notice to the operator of the turntable to set it for track 8. This was about 2:30 A. M. He then started backing the engine toward the turntable at about four miles per hour, looking behind as he did this. The operator of the turntable did not respond promptly and McGee stopped the engine, blew three more blasts, and when the turntable was set, he again started backing the engine (Record, p. 29, line 34; p. 55, line 18; p. 56, line 30, to p. 57, line 12; p. 63, line 20, to p. 64, line 12). Just as the tender was near the turntable the operator noticed something dragging between the

right-hand rear wheels of the tender and gave McGee a stop signal. The engine was stopped immediately just as the tender was entering upon the turntable. The object dragging at the rear wheels of the tender was discovered to be decedent's body. When the engine was stopped, the body was either wholly or partially on the turntable, and lying partially across the right-hand rail of track 8 (Record, p. 30, line 27; p. 33, line 38, to p. 34, line 10; p. 35, line 18; p. 62, line 20; p. 63, line 20, to p. 65, line 40; p. 82, line 8, to p. 83, line 8; p. 93, line 5).

24. When McGee approached engine 3709 at the rear, and when he was walking around it prior to boarding it, no one was working on that engine, or on engine 3835 on track 7, or on the engine on track 9 (Record, p. 28, line 1; p. 38, line 25; p. 59, line 20; p. 96, line 1).

25. Maloy, the turntable operator, saw no one near the rear of engine 3709 when he set the turntable for it (Record, p. 66, line 10). The hostler looked to the rear as he was backing out, and did not see decedent. When backing the engine the tender cut off the view of the track to the rear for about twelve feet (Record, p. 56, line 9).

26. The time the engine crew was to take charge of the engine and put it into service was posted on a blackboard in the roundhouse. That posted time had nothing to do with the time the engine was to be backed out of the roundhouse. Engine 3709 was scheduled to leave the vicinity of the roundhouse in charge of the road engine crew at 3 A. M. Due to the delay occasioned by the accident it actually left at 3:18 A. M. (Record, p. 22, line 32; p. 23, line 15; p. 25, line 10; p. 46, line 18). The first impression from the testimony of Mr. Weiss might be that the engine was to be backed out of the roundhouse by the hostler at 3 A. M. He later makes it entirely clear

that the records from which he testified showed the time when the engine was to be taken by the engine crew from the place where it was left by the hostler, and not the time it was to be backed from the roundhouse (Record, p. 24, line 26; p. 25, line 10). McGee, the hostler, always delivered engines at the place where the engine crew were to take them a half hour before the crew were to leave with them. On the night of the accident he took engine 3709 out of the roundhouse at the usual time (Record, p. 57, line 30 to p. 58, line 10). A half hour before the engine crew was to take the engine from the vicinity of the roundhouse would not be too early to back it out of the roundhouse (Record, p. 108, line 10 to line 35).

27. The instructions not to move the engines too early were merely intended to prevent track congestion at the water plug where the engines were left for the train crews (Record, p. 49, line 30).

28. While bells were ringing and whistles were sounding more or less frequently throughout the roundhouse, three blasts of the whistle had a distinct and well understood meaning; it was a "back-up" signal and a call for the turntable (Record, p. 55, line 30; p. 64, line 1).

Reasons Relied on for Allowance of the Writ.

1. The State Court of New Jersey has decided federal questions of substance in a way probably not in accord with applicable decisions of this Court, to wit:

(a) The State Court erroneously decided that the evidence warranted a finding of negligence on the part of petitioner.

(b) The State Court erroneously decided that the evidence warranted a finding that at the time of the accident decedent was engaged in interstate commerce.

(c) The State Court erroneously decided that the evidence warranted a finding that decedent's death was not due to his own negligence.

To this petition is annexed a supporting brief and with it is presented a certified transcript of the record and proceedings in the Hudson County Circuit Court and in the New Jersey Court of Errors and Appeals.

WHEREFORE petitioner prays that a writ of certiorari may be issued to the Court of Errors and Appeals of New Jersey where the record herein is now lodged, requiring that Court to certify said record and judgment to this Court to the end that the errors complained of may here be reviewed and corrected.

Dated June 15, 1929.

NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner.

By

ALBERT C. WALL,
Its Attorney.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

No.

NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,

v.

DONATO MARCONE, as Administrator of the Estate of Joseph Marcone, deceased,
Respondent.

BRIEF IN SUPPORT OF PETITION.

POINT I.

The evidence is wholly insufficient to establish negligence on the part of the petitioner.

1. There was a complete failure to establish the negligence alleged in the complaint.

(a) The engine was under perfect control. It was moving about four miles per hour (Record, p. 56, line 38; p. 66, line 18). The turntable being but 68.3 feet from the rear doors of the roundhouse, the movement necessarily had to be very slow.

(b) All customary warnings of the movement of the engine were given. Three blasts of the whistle were

sounded just prior to starting the engine the first time, and also just prior to starting it the second time. The engine bell was rung before the engine was started. It continued to ring during the entire movement, and until after the accident. These were the only warnings given when engines were about to be backed out of the round-house (Record, p. 42, line 18; p. 55, line 16; p. 63, line 31; p. 88, line 16). Three blasts of the whistle was a "back-up" signal, indicating that the engine was about to be moved onto the turntable (Record, p. 43, line 25; p. 55, line 30; p. 64, line 1).

(c) There was no defect in the engine. It was in good condition (Record, p. 60, line 5).

(d) The engine was properly equipped with good head light, a light on the rear of the tender and cab lights, in all about twelve lights. They were all lighted before the engine was moved. These lights are not turned on until the engine is about ready to be moved (Record, p. 29, line 18; p. 37, line 16; p. 49, line 15; p. 55, line 8).

(e) The only question with respect to petitioner's negligence which the Trial Court submitted to the jury was whether warning was given of the impending movement of the engine (Record, p. 118, line 10 to line 25; p. 119, line 10 to line 25).

2. The evidence is undisputed that prior to the movement three blasts of the whistle were sounded, and that the bell was ringing during the entire movement and was still ringing after the discovery of decedent's body, and further, that these were the only customary warnings with respect to the movement of the engines. In addition, all the engine lights were lighted and the air pump was going. It was operated by steam, and was started about

ten minutes before the engine was started. It could be heard thirty to forty feet (Record, p. 54, line 9.) The lights on the engine and the operation of the air pump were of themselves, and without regard to the sounding of the whistle or the ringing of the bell, sufficient warning that the engine was about to be moved. From decedent's familiarity with the operations in the roundhouse he knew when these lights were on and the pump going the engine would very soon be moved.

3. The fact that whistles were sounded and bells rung in other parts of the roundhouse and at all times did not in any way render ineffective the warning of the three blasts of the whistle, which was the well-known "back-up" signal, and a call for the turntable. One in as close proximity to engine 3709 as decedent was could not fail to know that the hostler was about to back that engine out of the roundhouse, and he could not confuse the "back-up" signal with whistles sounded in other parts of the roundhouse.

4. Not only were all usual signals given, but within a very short time prior to the movement of the engine, careful observations were made all round and underneath engine 3709, and also of the two engines on adjacent tracks, 7 and 9, to ascertain if anyone was working on any of them, and no one was discovered. Petitioner had discharged its full duty to decedent and was in no way chargeable with negligence.

5. Under the Federal Employers' Liability Act, negligence must be established against defendant, otherwise there can be no recovery.

Seaboard Air Line R. Co. v. *Horten*, 233 U. S., p. 492;

Missouri Pacific R. R. Co. v. *Aeby*, 275 U. S. 426 (at p. 429);
Erie R. R. Co. v. *Winfield*, 244 U. S. 170 (at p. 172).

6. This case is brought under the Federal Employers' Liability Act and is governed by that act and by the principles of the common law as applied in the Courts of the United States.

Missouri Pacific R. R. Co. v. *Aeby*, 275 U. S., p. 426 (at p. 429);
Toledo, St. Louis & Western R. Co. v. *Allen*, 276 U. S., p. 165 (at p. 169, bottom).

7. This Court will examine the record and if found as a matter of law that the evidence is not sufficient to sustain a finding that the carrier's negligence was a cause of death, the judgment of the State Court will be reversed.

Chicago, M. & St. P. R. Co. v. *Coogan*, 271 U. S., p. 472 (at p. 474), and cases cited in that opinion.

8. There was no eye-witness to the accident. The evidence wholly fails to disclose how it happened. The record leaves the whole matter in the realm of speculation and conjecture. This is insufficient to sustain the judgment.

Chicago, Milwaukee & St. Paul R. R. Co. v. *Coogan*, 271 U. S. 472 (at p. 478), and cases cited.

9. Not only did the respondent fail to fix negligence upon petitioner, but the evidence affirmatively demonstrated that it had been guilty of no negligence. Hence, petitioner was entitled to a judgment of non-suit, and at the close of the case to a directed verdict.

10. Where there is but a mere *scintilla* of evidence, the State Court, in actions brought under the Federal Employers' Liability Act, is required to follow the rule established in the Federal Courts and order a non-suit, or direct a verdict for defendant.

Baltimore & Ohio R. Co. v. *Groeger*, 266 U. S., p. 521;
Gulf M. & N. R. Co. v. *Wells*, 275 U. S., p. 455;
Toledo, St. Louis & Western R. Co. v. *Allen*, 276 U. S., p. 165;
Western & Atlantic R. R. Co. v. *Hughes, Admrx.*, decided by this Court February 18, 1929, 73 U. S. Law Ed., Advanced Opinions, March 1, 1929, page 268.

The New Jersey Court of Errors and Appeals concedes that the bell was rung and the whistle sounded, but denies the adequacy of these warnings on the ground that bells and whistles "were sounding around there all the time," and implies that reasonable care required that a lookout should have been posted on the rear of the tender (Record, p. 137, line 15). The Court ignores the fact that the turntable man was at the rear of the engine; that the hostler kept a lookout toward the rear as he was backing out of the roundhouse; that the engine was moving only four miles per hour, and that in addition to the sounding of the bell and whistle, twelve lights on the engine and the air pump in action unmistakably indicated that the engine was about to be moved. Decedent was close to the engine and if giving any attention at all to his safety, he could not mistake the meaning of all these warnings.

Furthermore, the petitioner owed to decedent the duty of warning only when he was engaged in the performance

of his duties and while in a place where his duty called him. His duty did not call him to the place where the accident happened.

The State Court further held that the engine was prematurely moved in advance of the posted time, and when decedent had reasonable ground to believe that it would not be moved (Record, p. 137, line 19). This is a clear misapprehension of the evidence. The posted time was the time when the engine crew was to take charge of the engine for road service, and had no relation to the time it was to be moved by the hostler from the roundhouse (Record, p. 25, line 10; p. 46, line 18).

POINT II.

At the time of the accident, decedent was not engaged in interstate commerce.

The engine which ran over decedent was No. 3709. He had finished all of his work on that engine about four hours prior to the accident. Having nothing further to do on it, he had no call or reason to go to that engine or to stand upon or cross over Track No. 8 (Record, p. 71, line 20).

He had also finished all his work on engine No. 3835 and had placed his tools on the inspection wagon ready for removal from the roundhouse. His gang were to stop work at 3 A. M., only a few minutes after the accident (Record, p. 69, line 5 to p. 70, line 25; p. 74, line 1; p. 97, line 30 to p. 98, line 18; p. 105, line 30). Furthermore, he had no work to do on Track 9 (Record, p. 99, line 37).

Siddell, his leader, had not assigned to him any further work after completing engine No. 3835 and he had no more work for him that night (Record, p. 74, line 10).

He had been instructed to wait at the inspection wagon for Siddell's return. That wagon was on the concrete runway, ten feet wide, in front of the engines (Record, p. 72, line 12; p. 101, line 26 to p. 102, line 5).

If he was attempting to leave the premises (which was in violation of his orders), there was no reason for his crossing the tracks at the rear of the engines, because petitioner had provided for him a perfectly safe way of exit along the concrete walk ten feet wide which extended in front of the engines along the entire outer circumference of the roundhouse (Record, p. 102, line 1).

That he was not attempting to do any work is evidenced, not only by the fact that his tools were on the inspection wagon where he himself had doubtless placed them, and no tools were found along the track at the scene of the accident (Record, p. 73, line 1 to line 22; p. 83, line 10; p. 98, line 15 to line 35).

Under the circumstances, it is clear that he had abandoned his employment in interstate commerce; that he was at best a mere licensee at the place where the accident happened; that he had voluntarily entered a place of danger where he was not engaged in performance of any duty owed to petitioner, and where he was outside the protection of the Federal Employers' Liability Act.

In *Erie R. R. Co.* v. *Welsh*, 242 U. S. 303, this Court said (p. 306):

> "By the terms of the Employers' Liability Act the true test is the nature of the work being done at the time of the injury, and the mere expectation that plaintiff would presently be called upon to perform a task in interstate commerce is not sufficient to bring the case within the act. *Illinois C. R. R. Co.* v. *Behrens*, 233 U. S. 473, 478, 58 L. Ed. 1051, 1055, 34 Sup. Ct. Rep. 646, Ann. Cas. 1914C 163, 10 N. C. C. 153."

To the same effect is *Minneapolis & St. Louis R. R. Co.* v. *Winters*, 242 U. S. 353.

In *Krysiak* v. *Penn. R. R. Co.*, 270 Fed. 758 (C. C. A. Third Circuit), plaintiff's intestate had been employed in interstate commerce during the day and in leaving his place of employment to go home, chose a dangerous way instead of the safe way provided by his employers. While using that way he was injured.

The Court said (p. 760):

> "At that moment, we think, Krysiak ended his employment and lost the status of an employee in interstate commerce. Later, when he was killed, he was not engaged in his employer's work, or in an incident to it, but was engaged in his own private concerns."

Tested by the rule laid down in the foregoing cases, at the time of the accident decedent was not engaged in interstate commerce or in any duty pertaining to his employment, and petitioner was not liable for the injury sustained.

POINT III.

Decedent's death was due to his own negligence and his disobedience of orders.

As already pointed out, decedent had finished his work on engine 3709 four hours before the accident. He had finished his work on engine 3835 prior to the accident and had placed his tools on the inspection wagon preparatory to leaving the roundhouse. He had no work to do on Tracks 7, 8 or 9. The latter track was adjacent to the place of the accident. He had been told to wait for Siddell's return at the inspection wagon, which was lo-

cated on the concrete runway in front of the engines (see this brief, pp. 17 and 18). At the inspection wagon where he was told to wait he was perfectly safe. He went to a place of danger where his duty did not require him to go, and there disregarded ample warnings of the impending movement of the engine. He alone was responsible for the accident resulting in his death.

We respectfully submit that for the reasons stated, the writ of certiorari should issue.

ALBERT C. WALL,
Counsel for Petitioner.